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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-459

NORMAN NEW RIDER, a minor, by his mother and next friend, WILMA WILLIAMS; LLOYD CUMMINGS, JR., a minor, by his parents and next friends, LLOYD and LILLIE CUMMINGS; KENNETH SMITH, a minor, by his mother and next friend, VELMA SMITH,
Petitioners,

vs.

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 1, Pawnee County, Oklahoma, whose members are ALBERT ALLEY, President, H. L. RATLIFF, FRANK MALTSBERGER, DONALD WATERS, R. L. WOODARD; H. L. HOLLOWAY as Superintendent of Pawnee School District; JAMES CHILDERS, as Principal of Pawnee Union High School,
Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition For Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinions delivered by the Courts below are not yet officially reported, but are appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Is the wearing of long hair in public schools by Petitioners, contrary to a school dress code containing hair length regulations, applicable to all students alike regardless of race, a constitutionally protected right under Freedom of Speech or Expression?

2. Is a school dress code, containing hair length regulations, which applies to all students alike, regardless of race, a denial of equal protection of the laws?

3. Does the school dress code, containing hair length regulations violate any constitutionally protected Freedom of Religion practiced by Petitioners?

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Constitutional provisions and regulations involved are as stated by Petitioners.

STATEMENT OF THE CASE

Petitioners, three minor Pawnee Indian Students, were suspended from Pawnee Junior High School for not complying with hair length regulations in the school dress code requested by student representatives (R, II-75) and enforced by respondent School Board through its authorized agents.

Petitioners sought injunctive relief in the United States District Court for the Northern District of Oklahoma which was denied on August 10, 1972. (R, I 84-88)

The Trial Court's decision was affirmed by the Court of Appeals for the Tenth Circuit by an opinion rendered May 25, 1973 (Petitioner's App. F), and Petitioners are seeking review by certiorari. Respondents' Brief in opposition is based upon the following material facts established in the record.

DRESS CODE

"It is a proven fact, in all good school systems, the student body takes pride in their mannerism and appearance each day. There are to be no organizational initiations which require unfavorable dress. (This does not include Beta Club during initiation week and Sady Hawkin's Day.) No student is permitted to wear any unusual clothing to school. We expect you to wear normal dress as it was manufactured to be worn.

Girls acceptable dress: Dresses, skirts, pant dresses, pant skirts, slack suits, and slacks with overblouses. An acceptable pant dress or pant skirt must look like a dress from the front and the back, either with a skirt flap or with a deep enough pleat to appear as a dress and not wide-legged shorts. The same rule for length of regular dresses goes for pant skirts and pant dresses.

Not acceptable: Shorts, cut offs, jeans (blue or otherwise) or any boy style pants (any pair of pants that have an opening in the front and made with pockets in the back is considered "boy style pants"), extreme mini skirts, sweat shirts, T-shirts. Blouses or shirts designed to be worn inside, must be worn in this manner. No odd hair coloring or styles. The length and style of clothing should be in keeping with those generally accepted in the community as being in good taste and should be of appropriate length so as not to embarrass them or others when sitting down.

> **Boys acceptable dress: Jeans, blue or otherwise, colored pants as long as they are in good taste and not to the extreme, shirt tails so designed must be worn inside of pants, socks shall be worn with all types of foot wear.**
>
> **Not acceptable: Cut offs, shorts, sleeveless shirts, sweat shirts, white T-shirts, leather pants, and footwear without socks. *Hair should have no odd coloring or style, It should be tapered or blocked in the back and cannot touch the shirt collar or ears, and should be one-fourth inch above the ear lobe and face clean shaven.".* (Emphasis ours).**

The code provides school spirit, pride and maturity for students in the classroom so that the teaching or subject matter can prevail without disruption. (R, II-74). It also promotes safety in shop areas and in the school's industrial program. (R, II-74). The formal dress code was first adopted three summers ago at the request of student representatives and thereafter formulated by the Student Council, student club officers and school officials. (R, II-75). Prior to this time hair length and dress had been controlled on an individual basis without a formal code. (R, II-75). The exception of braids was permitted in the Fall of 1972 by an administrative decision at the request of Mrs. Cummings, mother of the plaintiff Lloyd Cummings, for a younger son then in the elementary school. (R, II-76). He never attended school without his hair in braids. (R, II-77). The 940 student body is composed of three ethnic groups of which approximately 33% are American Indian. (R, II-77). Only one male child has worn his hair in braids under the exception previously allowed. (R, II-77). Pawnee Indians have not worn their hair long for fifty years or longer. (Defendants Exhibit 7 at R, II-123). A strong support does not exist among the Indian parents for the school

board and the dress code together with its enforcement against all ethnic groups in an equal manner. (Defendant's Exhibit 7 at R, II-123 and R, II-83). The exception of braids for Indian students was eliminated from the dress code after the Trial Court initially dismissed this action because of problems arising over the exception for Indian students just prior to and subsequent to the filing of this action. (R, II-78). Militant Indian Leaders threatened to bring the town and the school to its knees and the exception was becoming a source of controversy among parents and students of all races. (R, II-79, R, II-80 and Defendant's Exhibit 7 at R, II-123).

There was also an indication to school officials of a desire on the part of the Indian students that they did not wish to have an exception made in the rules for their race. (R, II-79, R, II-80, R, II-81 and Defendant's Exhibit 7 at R, II-123). The violation of the code by the plaintiffs resulted in their suspension from school for the balance of the spring term of the school year of 1971-1972, and was not an indefinite suspension.

Dr. Muriel H. Wright, Editor of Chronicles of Oklahoma, the Oklahoma Historical Society's publication and author of "A Guide To The Indian Tribes of Oklahoma", testified she was familiar with the custom and tradition of the Pawnee Indians and there was no tradition or custom among male members of the tribe to wear their hair long and in braids. (R, II-94). In addition she exhibited copies of portraits of Pawnee Indians painted in the early 1820's by Charles Bird King, one of the great portrait painters of Indians who came to Washington during that period, which were introduced into evidence. (R, II-94, and Defendant's Exhibit 5 and 6 at R, II-121 and 122). An examination of these Exhibits will show that in the 1820's the Pawnee hair style was a roach or scalp

lock, the style in which the hair was cut close to the head except for a narrow ridge from the forehead to the crown. In addition, the cover picture and the picture on page 254 of "The American Heritage Book of Indians" was introduced into evidence as Defendant's Exhibit 3. The cover picture is of Pawnees painted by Charles Bird King during the same period showing their hair style and the portrait shown on page 254 of Defendant's Exhibit 3 is a painting by the early frontier painter, Stephen Long, of a Council meeting of Pawnees held in the 1820's, neither of which indicate a tradition of hair style as being long, parted in the middle and braided on each side, but instead the roach or scalp lock style is shown. (Defendant's Exhibit 3, cover picture and portrait of Council on page 254). Also, the American Handbook of Indians, 1906 Edition, mades reference to contact in the 1540's by Coronado with a Pawnee Indian by the name of "Turk" and Pawnee Indians under Chief Tatarrax, "all naked, with bows and some sort of thing on their heads", which was admitted not to be long hair and braids but the roach. (R, II-28).

Dr. Weltfish, called by the Plaintiffs as their witness, first stated on direct examination as follows:

> Q. Now, Dr. Weltfish, what was the traditional, ordinary everyday hair style of the Pawnee Indian people?
>
> A. There is no question that both men and women wore their hair parted in the middle with two braids, one on each side. (R, II-11).

Later she attempted to qualify the statement by stating that the roach was only worn by warriors during time of war. Dr. Weltfish also admitted that in her book, "The Lost Universe", about the Pawnee Indians, that she

made no reference to the traditional hair style of long, parted in the middle and braids on each side except for warriors in time of war, but instead admitted the text stated as follows:

> "The women's hair style was relatively uniform. It was parted in the middle and made into two braids, hanging down the shoulder in the front. The men's hair styles were more elaborate and varied. A great many of the men wore roaches, a ridge of hair standing up along the middle." (R, II-29 and 30).

The plaintiffs, according to the transcript, wish to wear their hair long (1) to perform Indian dances, (2) because it looks good on Indians, (3) because it is traditional style for Pawnee people and (4) to show pride in being an Indian. None wanted to wear their hair long for any religious purpose. (R, II-48 through 51, R, II-51 through 53, and R, II-53 through 57).

Dr. Weltfish admitted on cross-examination that she had sections in "The Lost Universe", her book about the Pawnee Indians, on dance ceremonies and religious or ceremonial celebrations, but made no mention in the text of the significance of wearing hair long and in braids. (R, II-29 and 40). The religious significance to which she had reference is that any act in which a Pawnee child desired to engage would have religious significance since everything was of religious significance. (R, II-41). She also admitted that Alice Fletcher, following the opinions of John Dunbar who wrote of the Pawnee Indians in 1840, wrote in the Handbook of American Indians that "Many tribes had a distinctive mode of cutting and dressing the hair, and the style occasionally suggested the nickname by which the people were called by other tribes, as, for instance, in the case of the Pawnee, who cut the hair

close to the head, except for a ridge from the forehad to the crown where the scalp-lock was parted off in circles, stiffened with fat and paint, made to stand erect, and curved like a horn, hence the name 'Pawnee' derived from 'pariki', horn." (R, II-23 and 25). Admittedly, she disagreed with the speculation of the derivation of the name, but admitted these early writers that had been with the tribe observed such a hair style to cause them to pursue such reasoning as a source for the name. (R, II-26).

It would be practically impossible to enact a dress-hair code for different ethnic groups within a school system which would not create a disruptive atmosphere. (R, II-105).

Further, the Trial Court found the regulation, unlike a regulation relating to speech, did not infringe upon any religious belief held by Plaintiffs, nor did the regulation discriminate against Plaintiffs on the basis of race, religion or culture. (R, I 86-87).

The Tenth Circuit decision affirmed the Trial Court.

ARGUMENT

The wearing of long hair in public schools should be subject to regulation by school authorities without infringing upon free speech or expression.

The wearing of long hair in public schools is not an exercise of Freedom of Speech. In *Freeman* v. *Flake*, 448 F.2d 258 (10th Cir. 1971), cert. den., 405 U.S. 1032, 92 S. Ct. 1292, 31 L.Ed. 2d 289 (1972), the Court of Appeals for the Tenth Circuit stated:

> "The wearing of long hair is not akin to pure speech, at most it is symbolic, indicative of ex-

> pression of individuality rather than a contribution to the storehouse of ideas. With reference to symbolic speech, the Supreme Court said in the draft card case, *U.S.* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672: 20 L.Ed.2d 672:
>
> > 'We cannot accept the views that an apparently limitedless variety of conduct can be labeled 'speech' whenever the person engaged in the conduct intends thereby to express an idea'."

When "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the "non-speech" element can justify incidental limitations on first amendment freedoms, and a governmental regulation is sufficiently justified if it is within the constitutional power of government, if it furthers an important or substantial governmental interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged first amendment freedom is no greater than is essential to the furtherance of that interest. *United States* v. *O'Brien* [*1968*], 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673, reh. den. 393 U.S. 900, 21 L.Ed.2d 188, 89 S.Ct. 63. See also *Right of Free Speech*, 21 L.Ed.2d 976 at 1005.

In the instant case the Indian children stated they desired to wear their hair long (1) to perform Indian dances, (2) because it looks good on Indians, (3) because it is traditional style of Pawnee people and (4) it is one manner to show they are proud to be Indians. Being in a dance band is not sufficient justification. (See *Ferrell* v. *Dallas Ind. School Dist.* (CA 5 Tex.) 392 F.2d 697, cert. den. 393 U.S. 856, 21 L.Ed.2d 125, 89 S.Ct. 98), and the

Trial Court disposed of the latter three reasons (R, I, 86-87). *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), relied upon by Petitioners is clearly distinguishable in that this Court stated:

> "The problem posed by the present case does not relate to the regulation of the length of skirts or the type of clothing, to hair style or department,"

but involved direct, primary First Amendment rights akin to "Pure Speech".

Petitioners urge the Court to adopt a two-part test to determine whether conduct is entitled to First Amendment protection as "symbolic speech": (1) Did the individual intend his conduct to have communicative value -- this is obviously met in *United States* v. *O'Brien*, 391 U.S. 367, supra, where O'Brien burned his Selective Service Registration Certificate publicly, intending to influence others to adopt his anti-war beliefs; (2) was the conduct understood by others as communicating the intended idea -- again this would be met in O'Brien inview of the fact that it was accomplished in a crowd of people, with F.B.I. agents present, although the agents knew at the time only that small white cards were being burned. Especially would this second step be met in view of the fact that members of the crowd began attacking O'Brien and his companions after the burning. If such did not communicate the intended idea, it would be difficult to conceive what else needed to be done to so communicate the idea. When actually applied, it is easy to see that the "two-step test" urged by Petitioners would of necessity require reversal of O'Brien.

It is submitted that if the Court grants certiorari in this matter that the Federal Courts will be deluged with

all manner of symbolic problems and will of necessity, be engaged in the myriad of problems that arise in the day to day operation of the public school systems across the United States. It seems apparent that local governments and school boards should continue to be entrusted with this responsibility.

II. A school dress code containing hair length regulations, which applies to all students alike, does not deny equal protection of the laws.

The regulation bears a rational relationship to a legitimate state objective, i.e., that of instilling pride and initiative among the students leading to scholarship attainment and school spirit and morale.

The instant dress-hair code regulation was not promulgated on the basis of race as condemned in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), upon national origin as condemned by *Oyanna* v. *California* 332 U.S. 633 (1948), upon alienage as condemned in *Graham* v. *Richardson*, 403 U.S. 365 (1971), upon indigency as condemned in *Griffin* v. *Illinois*, 351 U.S. 12 (1956) or upon illegitimacy as condemned in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972). Rather, the fact that the regulation applies equally to all students in the system is reflected by the record.

The very thrust of *Brown* v. *Board of Education*, supra, was that "Education is perhaps the most important function of State and local governments" and only by amalgamating children of various races, colors, cultures, ethnic and environmental backgrounds can the public schools become the effective marketplace for the benefit of all students. Common sense dictates that some uniform regulations are necessary in the operation of a school system.

Education, though one of the most important functions of the State, is not within the limited category of rights recognized by the Supreme Court as guaranteed by the Constitution (*San Antonio Independent School District* v. *Rodriquez*, (1973), U.S. 36 L.Ed.2d 16, 93 S.Ct.) To warrant condemnation by this Court, the regulation must impinge on the exercise of fundamental constitutional rights or liberties. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

> "By and large, public education in our nation is committed to the control of the State and local authorities" and "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson* v. *Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228.

The States, acting through their Courts, should determine what, if any, hair regulation is necessary to the management of their schools. *Freeman* v. *Flake*, supra.

III. The School dress-hair code violates no Freedom of religion practiced by Petitioners. None of the children testified that they wanted to wear their hair long as an exercise of any religious belief, and in fact none testified to their individual beliefs in this regard (R, II 48-51; R, II 51-53; R, II 53-57). Dr. Weltfish, called by Petitioners, after testifying to certain religious significance of long hair (R, II 16-17), admitted that any act that a Pawnee child wanted to engage in, as a form of speech, would have some religious significance in its background, since everything was of a religious significance. (R, II-41). It is submitted that any order of a school board would violate "freedom" of such a religion.

Federal Courts have the duty to entertain only solid claims of constitutional restraints under "color" of State law *Smith* v. *State of Kansas*, 356 F.2d 654 (10th Cir. 1966), cert. den. 389 U.S. 871 (1967), and a federal constitutional question must exist "not in mere form, but in substance, and not in mere assertion, but in essence and effect." *Cuyahoga River Power Co.* v. *Northern Ohio Traction and Light Co.*, 252 U.S. 388, 50 S.Ct. 404, 408, 64 L.Ed. 626.

It is submitted that any claim of restriction upon religious acts is mere form and assertion.

Petitioners claim in the case at bar does not reach the plateau of the circumstances existing in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1973). In that case, the Trial Court noted that the State compulsory attendance law interfered with the freedom of the Defendants to act in accordance with their sincere religious belief. In the instant case nothing of the kind was testified to by Plaintiffs nor were any such findings entered by the Trial Court, although the Court had the power to inquire as to such sincerity and bona fides of any purported religious belief held by Petitioners. *United States* v. *Seeger* 380 U.S. 163, 13 L.Ed.2d 733, 85 S.Ct. 850.

CONCLUSION

It is submitted that the process of educating children should remain where it has existed, with the State and local governments and that the hair-dress code and its application should be upheld.

As stated by Justice Black, sitting as a Circuit Justice in *Carr* v. *Schmidt*, 401 U.S. 1201, 27 L.Ed.2d 797, 91 S.Ct. 592,

"The only thing about it that borders on the serious to me is the idea that anyone would think the Federal Constitution imposes on the United States courts the burden of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance--the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of that States are more capable of deciding than the length of the hair of schoolboys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all of our 50 States. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear."

Therefore, the Court should not issue a writ of certiorari, or in the alternative, if granted, that the decision entered by the Tenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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